

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BIRUTE GUDENAVICHENE, individually,

Plaintiff,

v.

BAC HOME LOAN SERVICING, LP et al.,

Defendants.

2:11-cv-687-RCJ-CWH

ORDER

This is a foreclosure case involving a single property. Plaintiff seeks a preliminary injunction preventing the defendants from foreclosing on her home, claiming the defendants lack the authority because they do not hold the note. For the following reasons, the Court denies Plaintiff's Motion for Preliminary Injunction (#5).

BACKGROUND

Plaintiff Birute Gudenavichene is the owner of real property located at 8422 Galliano Avenue, Las Vegas, Nevada 89117 (the "Property"). (Compl. (#1) at 2). Plaintiff refinanced the Property and signed a note evidencing her obligation to repay the borrowed funds to the lender, Countrywide Home Loans, Inc. (*Id.* at 3). To secure the loan, Plaintiff execute a deed of trust against the Property in the amount of \$400,000. (Deed of Trust (#1) at 15). The deed of trust was recorded on February 16, 2005 and listed Countrywide as the lender, CTC Real Estate Services as the trustee, and Mortgage Electronic Registration System, Inc. ("MERS") as the "nominee for Lender and Lender's successors and assigns" and "the beneficiary." (*Id.*). Countrywide did not sign the note or the deed of trust. (Compl. (#1) at 3).

On December 1, 2007, Plaintiff defaulted on her mortgage payments. (Notice of Default

1 (#1) at 47). On July 1, 2010, "U.S. Bank National Association, as trustee, for the benefit of
2 Harbor View 2005-2 Trust Fund, by BAC Home Loans Servicing, LP FKA Countrywide Home
3 Loans Servicing LP" executed a substitution of trustee, under which ReconTrust Company,
4 N.A. replaced CTC Real Estate Services as trustee. (Substitution of Trustee (#1) at 44-45).

5 ReconTrust filed a notice of default and election to sell with the Clark County Recorder's
6 office on July 2, 2010. (Notice of Default (#1) at 47). On March 14, 2011, ReconTrust filed
7 a notice of trustee's sale with the Clark County Recorder's office. (Notice of Trustee's Sale
8 (#1) at 50-51). A trustee's sale was scheduled for May 3, 2011, at 10:00 a.m. (*Id.*).

9 Plaintiff filed this action on April 29, 2011 against BAC Home Loan Servicing, LP; Bank
10 of America, N.A.; Countrywide Home Loans, Inc.; U.S. Bank, N.A., as trustee for Harbor View
11 Mortgage Loan Trust 2005-2; MERS; and ReconTrust Company, N.A. (collectively
12 "Defendants"). (Compl. (#1)). She asserts that the only entity entitled to foreclose on the
13 Property is "the Lender or a transferee of the note who holds the right to collect the funds
14 under the note." (*Id.* at 4). She also disputes the authority of the individuals who executed the
15 deed of trust, substitution of trustee, notice of default, and notice of trustee's sale on behalf
16 of Defendants. (*Id.* at 5). Plaintiff further asserts that she has no monetary obligation to any
17 of the Defendants except Countrywide Home Loans or its duly designated assignee who has
18 the right to receive payments under the note as a "Note Holder." (*Id.*). Finally, she asserts
19 that only Countrywide Home Loans or its duly appointed transferee has any right to institute
20 a foreclosure under the deed of trust. (*Id.*).

21 Plaintiff alleges the following causes of action: (1) wrongful foreclosure; (2) declaratory
22 relief; (3) violations of N.R.S. § 107.080; (4) unjust enrichment/promissory estoppel; (5)
23 interference with contractual relationship; (6) slander of title; and (7) injunction. (*Id.* at 5-11).

24 On May 2, 2011, Plaintiff filed motions seeking a temporary restraining order and
25 preliminary injunction to prevent the trustee's sale from proceeding, the recording of any deeds
26 or mortgages regarding the Property, any action that may deprive Plaintiff of the Property, and
27 any report regarding Plaintiff to credit reporting agencies. (Mot. for Preliminary Injunction (#5)
28 at 1-2; Mot. for TRO (#6) at 1-2). The motion for the temporary restraining order was denied

1 by this Court on May 3, 2011. (Order (#6)). The only matter before the Court to be decided
2 is Plaintiff's Motion for a Preliminary Injunction (#5).

3 **LEGAL STANDARD**

4 Federal Rule of Civil Procedure 65(a) allows a court to issue a preliminary injunction on
5 notice to an adverse party. "An injunction is a matter of equitable discretion" and is "an
6 extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is
7 entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 32 (2008).
8 To obtain a preliminary injunction, a plaintiff must demonstrate (1) that he is likely to succeed
9 on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief,
10 (3) that the balance of equities tips in his favor, and (4) that an injunction is in the public
11 interest. *Id.* at 20; *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). As to the
12 second element, the plaintiff must show that irreparable harm is likely, not just possible.
13 *Winter*, 555 U.S. at 22.

14 **DISCUSSION**

15 Plaintiff seeks a preliminary injunction, claiming the foreclosure is wrongful and
16 improper. (Mot. for Preliminary Injunction (#5) at 2). She asserts that none of the foreclosing
17 Defendants is the beneficiary, successor in interest of the beneficiary, trustee, or current note
18 holder, and therefore they lack the authority to foreclose on the note. (*Id.* at 6-7). She argues
19 that both the note and deed of trust must be assigned for a foreclosure to be valid, and
20 because the foreclosing Defendants were never assigned the note, they lack the ability to
21 foreclose. (*Id.* at 8, 10).

22 Nevada law allows a deed of trust to be used to "secure the performance of an
23 obligation or the payment of any debt." NEV. REV. STAT. § 107.020. Upon default, the
24 beneficiary, the successor in interest of the beneficiary, or the trustee may foreclose on the
25 property through a trustee's sale to satisfy the obligation. *Id.* § 107.080(2)(c). A nominee on
26 a deed of trust has the authority, as an agent, to act on behalf of the holder of the promissory
27 note and execute a substitution of trustees. *Gomez v. Countrywide Bank, FSB*, No. 2:09-cv-
28 1489-RCJ-LRL, 2009 WL 3617650, * 1 (D. Nev. Oct. 26, 2009). As long as the note is in

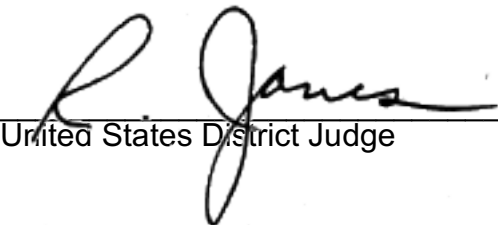
1 default and the foreclosing trustee is either the original trustee or has been substituted by the
2 holder of the note or the holder's nominee, there is no defect in the Nevada foreclosure. *Id.*
3 at *2.

4 In this case, the foreclosure process was properly executed. In 2008, Bank of America
5 acquired Countrywide Financial and took over its home loans. (See Bank of America Merger
6 History at <http://message.bankofamerica.com/heritage/#/merger-history/country-financial>). As
7 a result, Bank of America re-branded its mortgage offerings as Bank of America Corporation
8 Home Loans, or BAC Home Loans. (*Id.*). Therefore, in 2010, BAC Home Loans was the
9 successor in interest to the lender on the deed of trust and properly gave U.S. Bank National
10 Association the authority to execute a substitution of trustee. (See Substitution of Trustee (#1)
11 at 45). Accordingly, ReconTrust as the properly substituted trustee had the authority to initiate
12 foreclosure proceedings by filing a notice of default the next day.

13 CONCLUSION

14 For the foregoing reasons, IT IS ORDERED that Plaintiff's Motion for Preliminary
15 Injunction (#5) is denied

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17 DATED: This 5th day of October, 2011.

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20 United States District Judge
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